



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A270/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
DATE 23/07/2025	
LENYAI J	

**BODY CORPORATE OF LA MON VILLA
(SS no 108/2012; 173/2012, 518/2012; 776/2021)
MELROSE GARDENS INVESTMENTS (PTY) LTD**

First Appellant

Second Appellant

And

NIYAKHA GROUP(PTY) LTD

Respondent

IN RE:

**BODY CORPORATE OF LA MON VILLA
(SS no 108/2012; 173/2012, 518/2012; 776/2021)
MELROSE GARDENS INVESTMENTS (PTY) LTD**

First Plaintiff

Second Plaintiff

And

NIYAKHA GROUP(PTY) LTD

Defendant

Delivered: This judgment is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading to Caselines. The date and time of hand-down is deemed to be 14:00 on 23 July 2025.

JUDGMENT

LENYAI J (MUDAU ADJP and BAQWA J CONCURRING)

- [1] This is an appeal against the whole judgment and order granted by the High Court on the 18th July 2023. The leave to appeal was granted by the Supreme Court of Appeal on the 10th August 2023.
- [2] The appellants contend that the court *a quo* erred in upholding the exception brought by the respondent on the basis that the appellants amended particulars of claim lack the averments necessary to sustain a cause of action and should have dismissed the exception.
- [3] The appellants aver that they claimed unliquidated damages suffered by them as a result of the respondent's defective, unworkmanlike and unprofessional construction of the scheme 'LA MON VILLA' in the amount of R2 082 255.00, due and payable by the respondent to the first appellant.
- [4] The appellants submit that if regard is had to the exception, the compliant appears to be that no cause of action is pleaded or made in favour of the second appellant. They concede this point, however, contend that the second appellant seeks no relief against the respondent. It is further submitted that the second appellant has only been joined to the proceedings because it has a direct and substantial interest in the outcome of the action.
- [5] The appellants contend that the fact that the prayer at the end of the particulars of claim states that the "*Plaintiffs pray for judgment against defendant*" is of little consequence. The substantive relief sought as opposed to the preface to the

relief, is for *“Payment by the Defendant to the First Plaintiff in the amount of R2 082 255.00.”*

- [6] The appellants aver that the particulars of claim do set out the averments necessary to sustain a cause of action by the first appellant against the respondent. They submit that in this regard, the first appellant’s claim is clear and unambiguous in the particulars of claim:

- 6.1 The first appellant is the body corporate of a sectional title scheme known as “LA MON VILLA”;
- 6.2 As the body corporate, it is responsible for the maintenance, upkeep and repair of the common property of the sectional title scheme in terms of Section 3(1) of the Sectional Title Scheme Management Act 8 of 2011 (STSMA);
- 6.3 The respondent was the developer of the scheme;
- 6.4 The respondent constructed the scheme in a defective, unworkmanlike and unprofessional manner;
- 6.5 The Respondent’s conduct was wrongful *per se* in that its conduct caused physical damage to the common property of the scheme, in which case wrongfulness is presumed;
- 6.6 Alternately, the appellants contend that the respondent owed a legal duty to the public to construct the scheme in a professional and workmanlike manner, which legal duty is breached. This breach of legal duty was thus wrongful;

6.7 As a result of the respondent's intentional, alternatively negligent and wrongful construction of the scheme as aforesaid, the first appellant became obliged to effect repairs to the common property of the scheme in accordance with its statutory duties;

6.8 The cost of repairs in respect of the defective works, that is the first appellant's damages is R2 082 255,00, for which the respondent is liable to the first appellant.

[7] The appellants aver that the first appellant's claim against the respondent is thus clearly and unequivocally one arising in delict. The body corporate's right to proceed against a developer for the defective construction of a sectional title scheme has been recognized by the courts.

[8] The appellants contend that the respondent's complaints against the first appellant's claim are wide and varied. Firstly, the respondent denies that the first appellant has an obligation for the care and maintenance of the common property. They aver that this is simply incorrect, the first appellant as the Body Corporate of the scheme:

8.1 Is responsible for the administration and management of the common property for the benefit of all the owners of units in the scheme in terms of sections 2(5) and 3(1)(t) of the STSMA;

8.2 Is liable to be sued by owners for damage to the common property in terms of section 2(7) of the STSMA;

8.3 Is liable for the repair, maintenance, management and administration of the common property, including reasonable provision for future maintenance and repairs in terms of section 3(1)(a) of the STSMA;

8.4 Must maintain all the common property and keep it in a state of good and serviceable repair in terms of section 3(1)(l) of the STSMA.

[9] Secondly, the respondent alleges that the particulars of claim inaccurately state that the repairs relate to the common property but complains that the report shows that the costs for repairs do not “*at least to the full extent there*” relate to the common property.

[10] The appellants aver that if regard is had to the report, it is clear that it speaks to damage to the common property. The particulars of claim at paragraph 17, makes it clear and unequivocal that the first appellant is seeking damages from the respondent only for the repairs necessary “*to the common property ... caused by the Defendant’s intentional, alternatively negligent and wrongful act in constructing the scheme in a defective manner as set out above.*” Furthermore, the appellants submit that it must be accepted that there was in fact damage to the common property and that the first appellant’s claim relates to that. Whether the appellants will be able to prove their claim at trial in due course is not relevant at this stage.

[11] Thirdly, the respondent makes an allegation in the exception application at paragraph 2.14, that the repairs that the first appellant is obliged to effect are to “*remove alleged defects*” and “*cannot relate to ‘care and maintenance’ for which the First Appellant is allegedly liable.*”

[12] The appellants submit that the allegation seems to suggest that the obligations placed on the first appellant as contemplated by the STSMA do not require it to

repair defects to the common property. They contend that this is simply incorrect as the wording of the STSMA requires the first appellant to attend to the care, maintenance and repair of the common property.

[13] Fourthly, the respondent makes an allegation that the damages were suffered by the second appellant and not the first appellant. The allegation made is that the appellants are attempting to pursue an action against the respondent to *"recover the damages which the Second Appellant was supposed to have recovered, but which the Second Appellant cannot recover given the fact that it concluded a sale agreement with a voetstoots clause."*

[14] The appellants aver that the respondent bases this allegation on the background facts pleaded by them relating to the sale agreements concluded between the respondent and the second appellant. The appellants contend that if regard is had to these facts, it is clear that they are made to foreshadow why they obtained the Curasure report which evidenced the defective construction works performed by the respondent on the common property. Furthermore, the agreements between the second appellant and the respondent in no way evidence that the damages were suffered by the second appellant. The second appellant purchased the units in the scheme from the respondent and did not purchase the common property.

[15] The appellants aver that the first appellant's claim is for the damage to the common property and not to any individual unit in the scheme. Accordingly, the allegation that the damages are *"clearly damages which the Second Appellant will be suffering"* is incorrect.

- [16] The appellants contend that in support of its allegation that the claim really belongs to the second appellant, the respondent attached a co-operation agreement to its exception application. They aver that this is improper as no extraneous facts can be adduced to show that the pleading is excipiable. The contractual relationship between the appellants cannot harm or benefit the respondent.
- [17] The appellants submit that if regard is had to the co-operation agreement, it is clear that they acknowledge that the first appellant is obliged to maintain and repair the common property. The second appellant is simply providing the financial assistance to the first appellant to fund the legal action against the respondent. The agreement does not evidence that the damages were suffered by the second appellant, it simply evidences that the second appellant is paying for the costs of the action. Furthermore, it is submitted that it is trite that the respondent cannot rely on a contract to which it is not privy.
- [18] The appellants contend that there is nothing irregular about the second appellant funding the legal action against the respondent. They aver that if the first appellant is unable to recover the damages from the respondent, the second appellant as the owner of vast majority of the units in the scheme, would have to fund the repairs to the common property.
- [19] The appellants submit that the particulars of claim expressly make the necessary averments to sustain a delictual claim against the respondent and have also adduced documentary proof evidencing at least *prima facie* the respondent's defective construction of the scheme.
- [20] The appellants aver that the complaint by the respondent that the particulars of claim "*does not disclose a proper cause of action to make an allegation that*

the Respondent intentionally, alternatively negligently and wrongfully constructed a scheme” because there is “no indication what the Respondent intended to achieve and the allegation that the Respondent acted with intent is devoid of any particularity about what the Respondent intended to achieve” is equally without merit.

[21] The appellants contend that this complaint by the respondent concerns the *facta probantia*, which is the evidence necessary to support the primary facts. They submit that they do not need to give particularity as to what the respondent intended to achieve. All they need to allege is the *facta probanda*, which are those facts which if proven, would sustain a claim against the respondent.

[22] The appellants submit that all the primary facts have been pleaded, that is the five essential elements of a delictual claim which are conduct, wrongfulness, fault, causation and damages. These facts have been evidenced in the form of the reports attached to the particulars of claim. Furthermore, they submit that the only fact that requires some additional clarification is that of wrongfulness. It is submitted that it is settled law that if wrongfulness cannot be inferred, the plaintiff (appellant) must allege that the defendant (respondent) had a legal duty to the plaintiff which legal duty has been breached. The appellants aver that the wrongfulness can be presumed because the respondent’s conduct caused damage to the common property.

[23] The appellants further submit that, in the alternative, it is pleaded that the respondent:

23.1 owed the first appellant a legal duty to construct the scheme in a professional and workmanlike manner, and ensure that the scheme was free of defects;

23.2 breached this legal duty and

23.3 rendered its conduct wrongfully.

[24] The appellants submit that the above detailed legal duty is recognized in our law, and the Supreme Court of Appeal has affirmed that the body corporate has a right to claim damages against a developer for defective design and construction of the structures on the common property.

[25] The appellants contend that there is no ambiguity to the particulars of claim. It is settled law that the defendant (respondent) cannot complain about less than perfect pleadings in order to raise technical and formal objections unless it causes prejudice to the defendant. They submit that the respondent has not claimed any prejudice and the respondent knows precisely what case it must meet.

[26] The appellants submit that the argument by the respondent that they should have rather brought an application to amend their particulars of claim instead of bringing an appeal is rather belated.

[27] The appellants submitted in court that the court should uphold the appeal of the first appellant and the respondent be ordered to pay the costs of the main exception, the application for leave to appeal, the petition to the Supreme Court of Appeal and the costs of the Full Court Appeal. The appeal of the second appellant should be dismissed with each party paying their own costs.

- [28] The respondent submits that the appellants have conceded that the second appellant does not have a cause of action against it and that there is in fact only a cause of action pursued on behalf of the first appellant. It is further submitted that the second appellant is the driving force behind the litigation as it is funding the first appellant's litigation against it. It is submitted that this is a case of misjoinder as the second appellant should not have been added to the matter from the onset.
- [29] The respondent contends that the first appellant in the particulars of claim is claiming damages of the property belonging to the second appellant. It is submitted that there is no resolution authorizing the first appellant to claim on behalf of the second appellant. It is therefore impermissible for the first appellant to recover damages on behalf of the second appellant.
- [30] The respondent contends that it is clear that the damages dealt with in the particulars of claim relate to the construction of the units, and suddenly in paragraph 14 of the particulars of claim the common property is introduced as part of the damages.
- [31] The respondent avers that it is expressly alleged in paragraph 1.2 of the particulars of claim that the first appellant is the owner of the common property in the scheme. It is then also alleged that the first appellant is responsible for the maintenance, upkeep and repair of the common property. Furthermore, it must be trite that the common property is in fact owned by all the unit owners who each have an undivided share in the common property.
- [32] The respondent submits that ownership of the common property is to be distinguished from the duty of the Body Corporate to maintain the common property.

It is further submitted that the kind of alleged damages which the first appellant is attempting to recover from it are not anticipated expenses for maintenance, upkeep or repair, but in fact relate to the alleged costs for the complete redesign and reconstruction of the entire property, including the units owned by the second appellant.

- [33] The respondent contends that it is abundantly clear that the costs in the reports do not, at least to the full extent thereof, relate only to the common property. If the costs relate to the individual units, then the second appellant and not the first appellant should have been the one attempting to make a recovery from it.
- [34] The respondent submits that clearly the damages relate to the entire scheme, or at the very least the units, but the first appellant's duty is only with reference to the common property, where the focus is on care and maintenance.
- [35] The respondent contends that the first appellant failed to allege a foundation for the broad legal duty of care it relied upon. It is submitted that such a broad legal duty of care by a developer to the public at large is untenable. It is submitted that in order to make out a proper case in the pleadings, it is necessary for a party relying upon a duty of care to plead all the facts on which it wishes to rely on to enable the court to decide whether policy considerations or the *boni mores* warrants an extension of liability. It is further submitted that the first appellant had made extremely sketchy allegations relating to the existence of a legal duty of care in paragraph 17B of the particulars of claim.
- [36] The respondent avers that it is wrong for the first appellant to argue that a Body Corporate's right to proceed against a developer for defective construction of a

Sectional Title Scheme, based upon a legal duty, has been recognized in a number of matters.

[37] The respondent submitted in court that the appeal must be dismissed against both appellants with costs on a punitive scale as the court *a quo* had correctly upheld the exception.

[38] The Supreme Court of Appeal (SCA) in the matter of **Central Developments Tshwane (Pty) Ltd and Another v Body Corporate, Twee Riviere Aftree Oord (635/2019) [2020] ZASCA 107 (21 September 2020)** held that section 2(7)(b) of the STSMA empowers a body corporate to sue a developer in respect of any defects in the design and construction of foundations for structures situated on the common property, without the need for a special resolution in terms of section 2(7)(e) of the STSMA. The court further clarified that the section enables the body corporate to act on behalf of all the unit owners, who jointly hold the common property in individual shares. Requiring all owners to sue individually or jointly would simply be impractical. This statutory power to sue the body corporate aligns squarely with the obligations placed upon the body corporate in terms of sections 3(1)(a)(i) and 3(1)(i) of the STSMA, to maintain, repair and insure the common property. The court further emphasised that section 2(7)(b) of the STSMA affords a body corporate the right to sue for damages to the common property regardless of whether the responsible party is the developer, architect, builder or any other service provider.

[39] In the matter of **SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another 2000 (4) 1019 (SCA) @ para 7**, the SCA stated that:

“... , it has to be accepted that in general a builder does have a legal duty to both the building owner and to third parties to refrain from building something which is manifestly unsafe ...”

- [40] The SCA in the matter of **Feldman NO v EMI Music SA (Pty) Ltd/ EMI Publishing SA (Pty) Ltd (268/2008) [2009] ZASCA 75; 2010 (1) SA 1 (SCA) ; [2009] 4 All SA 307 (SCA) 91 June 2009) @ para 7** held that :

“...An excipient is obliged to confine his complaint to the stated grounds of his exception. As in Collin, the exceptions here contain no mention of non-joinder. They accordingly fell to be decided on the grounds taken, namely that the particulars of claim did not contain averments which founded the claim for relief. Nor in any arguing the appeals, did counsel for either party present argument based on the ground of non-joinder.”

- [41] In the matter of **Ijeoma and Another v University of Fort Hare (2174/2021) [2023] ZAECKMHC 88 (17 August 2023) @ para 18** the court held that:

“...While pleadings must be drawn carefully, the rules do not require drafting perfection and courts have been enjoined not to read them pedantically.”

- [42] Turning to the matter before us, the appeal by the second appellant seems to have lost steam. The appellants have conceded that there is really no case made out by the second appellant in the particulars of claim and it is only cited because it has an interest in the outcome of the matter as the majority owner of 21 units in the scheme.

- [43] It was clearly indicated in the matter of **Central Developments Tshwane** that a body corporate has the power to act on behalf of all the unit owners without a resolution as provided for in section 2(7)(b) of the STSMA. The explanations

given by the appellants for the second appellant to be a party in the proceedings do not find favour with me as the first appellant is statutorily mandated to act on behalf of all the unit owners in the scheme which includes the second appellant. I am of the view that the exception against the second appellant was correctly upheld by the court *a quo*, and the appeal of the second appellant stands to be dismissed.

[44] With regard to the appeal of the first appellant, section 2(7)(b) of the STSMA and the SCA in the matter of **Central Developments Tshwane**, make it clear that the body corporate has the right and legal standing to sue a developer for defects and damages in the design and construction of foundations for structures situated on the common property. The first appellant is within its legal rights to institute action against the developer and the challenge by the respondent in this regard is completely misguided.

[45] The particulars of claim do make averments that there is damage on the common property, and it is the responsibility of the first appellant to maintain, repair and insure the common property. The challenge by the respondent that the first appellant made extremely sketchy allegations relating to the existence of a legal duty of care in of the particulars of claim is of no moment. It is trite that the pleadings do not have to be perfectly or elegantly drafted. All that is required is for the pleadings to be clear so that the defendant knows the case it is required to answer to.

[46] Lest we forget, in the particulars of claim, the plaintiff only has to allege the material facts that it must prove to support its case (*facta probanda*). These are the core allegations that form the basis of its claim. The first appellant has done

that in its particulars of claim. The challenge by the respondent seems to suggest that the first appellant needed to allege the (*facta probantia*), which are the facts presented as evidence to prove the material facts, especially with regard to the allegation of duty of care.

[47] On proper consideration of the particulars of claim, the arguments by the parties, the STSMA and the stated case law in the judgment, I am convinced that the particulars of claim do make out the necessary averments to sustain a cause of action by the first appellant against the respondent.

[48] Under the circumstances the following order is made:

1. The appeal of the first appellant is upheld with costs on scale B;
2. The order of the court *a quo* is set aside and replaced with the following:

The exception against the first plaintiff's particulars of claim is dismissed with costs on scale B.
2. The appeal of the second appellant is dismissed with costs on scale B.



MMD LENYAI J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for Appellants	:	Adv JM Hoffman
Instructed by	:	Swartz Weil van der Merwe Greenberg
Counsel for Respondent.	:	Adv MP van der Merwe SC
Instructed by	:	Couzyn Hertzog & Horak Attorneys
Date of hearing	:	23 April 2025
Date of Judgement	:	23 July 2025